In the Supreme Court of the United States.

JOHN LOWE, APPELLANT,
v.
THE UNITED STATES. } No. 212.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

The question in this case is identical with the main question in the case of Gibson, No. 195 upon the docket for this term, in which we have filed a brief on the part of the United States discussing it at length, to which we respectfully invite the attention of the court in considering the present case.

THE QUESTION.

The question in this case arises upon the following facts:

The claimant, then a captain in the United States Navy with a creditable record, who had served during the civil war, was retired by order of the Secretary of the Navy pursuant to section 1444, Revised Statutes, on December 11, 1900, "with the rank and three-fourths of the sea pay of the next higher grade, i. e., rear-admiral, in

accordance with the provisions of section 11 of the naval personnel act, approved March 3, 1899," as recited in the order of his retirement. Since his said retirement, the claimant has received pay at the rate of $4,125 a year, being three-fourths of $5,500, the pay fixed by section 1261 of the Revised Statutes of the United States as that of a brigadier-general in the Army. The question raised is upon the contention of the claimant that his pay since his retirement should have been at the rate of three-fourths of $7,500 a year (the pay of a major-general in the Army), or $5,625 a year, making a difference of $1,500 a year over and above the pay which he has received since his retirement. This question is so thoroughly considered and so completely disposed of in the opinion of Mr. Justice Weldon, delivered in this case in the Court of Claims, that there really remains nothing to be done upon this argument other than to epitomize that opinion.

A QUESTION OF PAY ONLY.

Justice Weldon has very accurately defined this to be a question of pay only, for it is beyond dispute that the claimant's rank since his retirement is that of a rear-admiral. And, in this behalf, the contention of the claimant is, in substance, that as he was retired with the rank and three-fourths of the sea pay of the next higher grade, i. e., rear-admiral, he is entitled to three-fourths of the pay of a major-general, by virtue of section 13 of the

naval personnel act, by which it is provided, "That commissioned officers of the line of the Navy * * * shall receive the same pay * * * as is or may be provided by or in pursuance of law for officers of corresponding rank in the Army;" while, by section 1466 of the Revised Statutes of the United States, a rear-admiral ranks with a major-general of the Army. These statutes, he contends, define and establish his rights.

As thus stated, there certainly seems to be no room for controversy in the case; but the statement is inaccurate, in that it is incomplete through the omission of a very important proviso or modification of section 13, found in section 7 of the same act, which, when read with it, completely alters the aspect of the case. That proviso is as follows: "That the rear-admirals embraced in the nine lower numbers of that grade shall receive the same pay and allowances as are now allowed a brigadier-general in the Army." In the case of *Rodgers* v. *United States* (36 C. Cls. R., 266), it was decided that section 7 is to be read as a part of section 13, making special provision for the pay of the rear-admirals embraced in the nine lower numbers of that grade. That decision was affirmed by this court in 185 U. S., 83, and in delivering the opinion of the court, Mr. Justice Brewer said that the effect of section 7 was to add to the general provisions of section 13 a clause like this: "Except in respect to the nine lower numbers of the grade of rear-admiral" (p. 90). It follows that

section 13, so far as it relates to the claim now under consideration, should be read as follows, avoiding all indirection:

> A rear-admiral in the Navy shall receive as sea pay seven thousand five hundred dollars a year, except that each rear-admiral embraced in the nine lower numbers of that grade shall receive as sea pay five thousand five hundred dollars a year.

As thus read, it is clear that section 13, in its completed form, provides not one amount of sea pay for the rank of rear-admiral, but two amounts, $7,500 and $5,500; and it seems equally clear that the smaller sum is as much the sea pay of a rear-admiral as the larger amount. Thus the question is narrowed down to this: Which amount of sea pay attached to the rank or grade of rear-admiral should govern the pay of the claimant after his retirement? The Court of Claims answered this question by deciding that it should be the lower amount, $5,500. That decision certainly seems to as fully meet the literal requirements of the statute as though the decision had been that the larger amount of $7,500 should govern, because, as already said, either amount is the sea pay of a rear-admiral, the next higher grade to that from which the claimant was retired. The decision also seems to be a reasonable one. It seems evident that the purpose of section 11 is to give to the naval officers therein specified, upon retirement, not only the next higher rank, but the next higher pay, and

this is a purpose which is strictly carried out upon the retirement of an ensign, a master, a lieutenant, a lieutenant-commander, or a commander. Equality would certainly seem to demand that no exception should be made to this rule in the case of the retirement of a captain, and yet this is exactly what the claimant is contending for. But it is urged that $5,500, which is the salary of a brigadier-general, is not really the sea pay of the grade of rear-admiral, but is simply the sea pay of each of an excepted class of rear-admirals, to wit, those embraced within the nine lower numbers on the active list. There is a subtlety about this that is difficult to grasp. Section 7 of the naval personnel act at the outset provides "that the active list of the line of the Navy * * * shall be composed of eighteen rear-admirals." Then comes the proviso for the pay of each rear-admiral embraced in the nine lower numbers of that grade. It follows from this, as a mathematical conclusion, that since out of the eighteen rear-admirals on the active list thus provided for nine are of the *nine lower* numbers, nine are also necessarily of the *nine upper* numbers.

The sea pay of each rear-admiral embraced in the nine lower numbers of that grade is fixed, in effect, by this proviso to section 7, at $5,500, and the sea pay of each rear-admiral embraced in the nine upper numbers of that grade is fixed by section 13, in effect, at $7,500. If, as argued by

counsel for claimant, there is thus constituted a special class of rear-admirals receiving $5,500 each, there is equally constituted another special class receiving $7,500 each. This lower amount of sea pay of $5,500 is, we repeat, the next higher pay of the grade into which the claimant was retired. It is $2,000 more than the pay of a captain in the Navy, the rank held by the claimant at the time of his retirement, whilst, as thus determined, his present retired pay is $625 more than his full sea pay as captain. By the claimant's contention his retired pay would be three-fourths of $7,500, being $5,625 a year, or $2,125 more than his full sea pay as captain.

As for the argument on behalf of the appellant that "if the contention of the defendant is to prevail, instead of there being nine to receive the pay of a brigadier-general, as contemplated by the proviso [of section 7], there would be many more than nine receiving the pay or three-fourths thereof," sufficient answer seems to be that neither the number nor the pay of officers on the retired list can have any effect upon the operation of any of the provisions of section 7 relating to rear-admirals on the active list. This is necessarily so, since otherwise the retirement of a captain with the rank of rear-admiral must be construed in violation of that part of section 7 which provides that the active list of the line of the Navy shall be composed of eighteen rear-admirals. Furthermore, as a matter of fact, there are to-day,

according to the Register of the Commissioned Officers of the Navy of the United States to January 1, 1904, twenty-seven rear-admirals on the active list, nine of whom are *additional in grade* and eighteen of whom receive the pay of a rear-admiral embraced in the nine lower numbers of the active list—i. e., the pay of a brigadier-general. These rear-admirals *additional in grade* were promoted to that rank "for eminent and conspicuous conduct in battle or extraordinary heroism," pursuant to section 1506 of the Revised Statutes.

THE RODGERS CASE.

The decision of the Court of Claims in this case is largely rested upon the authority of the Rodgers case, above referred to, and it seems to us that that case is practically decisive of the present claim. In the Rodgers case, as in this case, the claimant, who was, at the time, a commodore in the Navy, passed, through the operation of the naval personnel act, into the grade and took the rank of rear-admiral. Immediately upon finding himself invested with this higher rank he, like the claimant, raised the question of his pay, and, like the claimant, alleged that since the rank of rear-admiral corresponded with that of major-general in the Army, his pay was, by virtue of section 13, the same as that of a major-general, or $7,500 a year. But it was held by the Court of Claims, and by this court, that his pay was governed by the proviso in section 7 of the same act and was, therefore, $5,500

per year. Here was a clear question of the pay of an officer newly passed into the grade and holding the rank of rear-admiral. It seems to be exactly the question in this case, except that Rodgers stepped into the active list and the present claimant stepped into the retired list of rear-admirals. There seems to be absolutely no reason why the pay of one rear-admiral who has reached that rank by promotion should be less than that of another who has reached the same rank by retirement. To make what seems to us the unfairness of the claimant's contention more emphatic, let us take the case of a captain in the Navy who, like the claimant, had served during the civil war with a creditable record, and who, on the same day that the claimant was retired as a rear-admiral, should be promoted to the same rank. By claimant's contention, the captain thus promoted would receive $5,500 as his full sea pay, whilst the claimant would receive, as his retired pay, three-fourths of $7,500, or $5,626, $125 per year more than the full sea pay of his brother officer who became a rear-admiral on the same day as himself. But here counsel for claimant refer to the discussion by Mr. Justice Brewer in the Rodgers case of the origin and purpose of the naval personnel act, as applied to its reconstruction of the grade of rear-admiral, wherein it was pointed out that the claimant in that case, with the others embraced in the nine lower numbers of that grade, had become a rear-admiral because of the abolition by the

naval personnel act of the rank of commodore, which he had formerly held, and not on account of distinguished services or any personal reason, and that therefore it seemed reasonable that Congress should have intended to make a distinction in the matter of pay between officers thus promoted and those of the same grade who at the time of the passage of the act were and had been holding the rank of rear-admiral. And the spirit of these remarks, it is contended, applies in favor of the claimant in the present case, because he is, by section 11 of the naval personnel act, marked out for special consideration upon retirement by reason of the fact of his services in the civil war, whereas by sections 8 and 9 of the same act, relating to the retirement of naval officers, it is provided that on retirement thereunder a captain shall be retired with the rank and three-fourths of the sea pay of a commodore, which rank is retained on the retired list for this purpose. It is true that a distinction is thus made in favor of the claimant, but it is also true that under the operation of section 11 this distinction has been preserved so far as rank is concerned, since the claimant has been retired under that section with the rank of rear-admiral, whilst a captain retired under section 8 or 9 would have been retired with the rank of commodore. And in this connection attention is again called to the fact already referred to in this brief that there are at present on the active list nine rear-admirals

additional in grade, who have been promoted to that rank not merely by reason of service in the civil war, but because of eminent and conspicuous conduct in battle or extraordinary heroism, and yet none of these officers thus promoted to the rank of rear-admiral receives the higher pay of that grade. Amongst this number are Admiral Evans, advanced by numbers for gallant conduct at the capture of Fort Fisher, January, 1865; Admiral Terry, advanced five numbers for gallant conduct in 1864 on an expedition up Red River; Admiral Sigsbee, advanced for extraordinary heroism during the war with Spain.

But the considerations which Mr. Justice Brewer found so pertinent and persuasive in the Rodgers case have no proper place here, for the reason that the weight and office of those considerations have been already employed in the Rodgers case in determining the precise question of pay raised in this case. So that it having been then decided that $5,500 per year is the lower sea pay of the grade of rear-admiral, it is manifestly idle to here review the considerations by which that conclusion was reached—a conclusion practically determinative of the present claim. For the sole question in this case is, What is the sea pay of a rear-admiral? The answer to this question must of necessity be found in the statutes relating to that subject. If, as contended by claimant, section 13, unmodified by section 7, is controlling,

then that pay is $7,500, but if, as decided in the Rodgers case, there are two grades of pay attached to that rank, and the lower grade of pay is $5,500, it would seem that this lower grade of pay should determine the pay of the claimant.

It seems to us that the decision of the Court of Claims in this case not only justly and fairly interprets the statutes relating to this claim, but that it is governed by and clearly follows the decision of this court in the Rodgers case, and therefore should be affirmed.

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